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Ta Wu Realty Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri & Anor

HIGH COURT (MELAKA) — APPLICATION FOR JUDICIAL REVIEW NO MT1–13–4 OF 2003
LOW HOP BING J
6 MAY 2004

Administrative Law — Judicial review — Application for — Duplicity of proceedings — Whether application to court would render policy of appeal to the Special Commissioners futile — Income Tax Act 1967, s 99

Administrative Law — Judicial review — Application for — Whether exceptional circumstances exist to grant leave — Principles governing application for leave for judicial review — Rules of the High Court 1980, O 53 r3

By a sale and purchase agreement dated 27 September 1991, the plaintiff bought three pieces of land in the Mukim of Cheng in the state of Melaka ('Cheng land') at the price of RM2,771,423.33 for the purpose of setting up an integrated steel mill, against which the local residents there had protested. Consequently, the applicant built the steel mill on another piece of land in Ayer Keroh, Melaka. On 5 March 1997, vide three agreements, the applicant disposed of the 'Cheng land' at RM9,489,577.86. The applicant submitted to the Inland Revenue Board the relevant notification in respect of real property gains tax for the disposal. Subsequently, the first respondent issued the notice of assessment for the purpose of subjecting to income tax the gains accrued from the sale thereof. On 17 January 2002, the applicant wrote to the first respondent stating that the gains on the disposal of 'Cheng land' should not attract income tax liability. On 20 August 2003, the applicant wrote to the first respondent requesting the respondent to review the decision. On 29August 2003, applicant filed a notice of appeal in Form Q under s 99 of the Income Tax Act 1967. Simultaneously, the applicant applied for leave to commence proceedings under O 53 r 3 of the Rules of the High Court 1980 for an order of certiorari to quash and set aside the notice of assessment on the ground that it contained an error of law on the face of it. The respondent objected to the application on the ground that the application is frivolous and vexatious, and an abuse of the process of the court because there was an alternative remedy of appeal to the Special Commissioners under the Income Tax Act 1967, s 99, which the applicant had already invoked by filing the notice of appeal in Form Q, and that there are no exceptional circumstances to grant leave for judicial review. It was further contended that in view of this application and the appeal to the Special Commissioners, there was duplicity of proceedings.

Held, dismissing the application with costs:

(1) The grant or refusal of leave in an application must necessarily depend on the facts of the case. There are certain classes of cases such as planning and tax cases where a statute provides for a specialized appeal procedure, and so the courts understandably may not grant judicial review save in

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exceptional cases, for example, where an applicant is able to demonstrate an excess or abuse of power, or breach of the rules of natural justice (see paras 24 and 25).

(2) In this application, the validity or otherwise of the impugned notice of assessment or the existence or otherwise of an error of law may be raised as an issue in the hearing of the application's appeal before the Special Commissioners, which is an additional platform or forum for the applicant to ventilate its views, in line with the fundamental rules of natural justice whereby the applicant is given every opportunity to present its case in the tribunal of the first instance (see paras 27 and 28).

(3) The aggrieved party is given the statutory right of appeal by way of case stated, which will be heard in the High Court pursuant to para 34, Schedule 5 to the Income Tax Act 1967. Subject to the rules governing such appeals, the entire matter and proceedings may finally and conclusively be determined by the Federal Court as the apex court (see para 29).

(3) The concurrent filing of the instant application and applicant's appeal before the Special Commissioners certainly constituted a duplicity of proceedings and was frivolous, vexatious and an abuse of the process of the court (see para 30).

[Bahasa Malaysia summary

Melalui perjanjian jual beli bertarikh 27 September 1991, plaintif telah membeli tiga bidang tanah di Mukim Cheng di negeri Melaka ('tanah Cheng') dengan harga RM2,771,423.33 untuk membina kilang keluli bersepadu yang dibantah oleh penduduk setempat. Akibatnya, pemohon membina kilang besi bersepadu di atas sebidang tanah di Ayer Keroh, Melaka. Pada 5 Mac 1997, melalui tiga perjanjian, pemohon telah menjual 'tanah Cheng' dengan harga RM9,489,577.86. Pemohon menyerahkan kepada Lembaga Hasil Dalam Negeri notifikasi yang berkaitan dengan cukai keuntungan harta tanah untuk dijual. Selepas itu, responden pertama mengeluarkan notis taksiran untuk mencukaikan pendapatan dari keuntungan yang diperolehi dari penjualan ini. Pada 17 Januari 2002, pemohon menulis kepada responden pertama bahawa keuntungan daripada jualan 'tanah Cheng' tidak patut dicukaikan. Pada 20 Ogos 2003, pemohon telah menulis kepada responden pertama meminta responden mengkaji semula keputusan itu. Pada 29 Ogos 2003, pemohon telah memfailkan notis rayuan melalui Borang Q di bawah s 99 Akta Cukai Pendapatan 1967. Pada masa yang sama, pemohon memohon kebenaran untuk memulakan perbicaraan di bawah A 53 k 3 Kaedah-Kaedah Mahkamah Tinggi 1980 untuk satu perintah certiorari untuk membatalkan dan menepikan notis taksiran berdasarkan kesilapan undang-undang atas fakta. Responden membantah permohonan itu atas alasan permohonan itu adalah remeh dan menyusahkan dan adalah penyalahgunaan proses undang-undang kerana terdapat remedi alternatif untuk membuat rayuan kepada Pesuruhjaya Khas di bawah Akta Cukai Pendapatan 1967, s99, yang mana pemohon sudah membuat permohonan dengan memfailkan

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notis rayuan dalam Borang Q, dan tiada keadaan luar biasa bagi memberi kebenaran untuk semakan kehakiman. Selanjutnya berdasarkan pada permohonan ini dan rayuan kepada Pesuruhjaya Khas terdapat kependuaan perbicaraan.

Diputuskan, menolak permohonan dengan kos:

(1) Untuk memberi atau menolak kebenaran sesuatu permohonan semestinya berdasarkan kepada fakta kes. Ada beberapa golongan kes seperti kes perancangan dan cukai di mana statut memperuntukkan proses rayuan khas, dan oleh itu mahkamah boleh menolak permohonan untuk semakan kehakiman kecuali kes luar biasa, contohnya di mana pemohon boleh menunjukkan kelampauan atau penyalahgunaan kuasa, atau melanggar rukun keadilan asasi (lihat perenggan 24 dan 25).

(2) Dalam permohonan ini, kesahan atau sebaliknya mengenai notis taksiran atau kewujudannya atau sebaliknya atas kesilapan undang-undang boleh dibangkitkan semasa pembicaraan rayuan pemohon kepada Pesuruhjaya Khas, tempat tambahan atau forum untuk pemohon menyuarakan pendapat seiring dengan rukun keadilan asasi di mana pemohon diberi peluang untuk mengemukakan kes kepada tribunal permulaan (lihat perenggan 27 dan 28).

(3) Pihak yang terkilan diberi hak di bawah statut untuk merayu melalui kes yang akan didengar oleh Mahkamah Tinggi berdasarkan perenggan 34, Jadual 5 Akta Cukai Pendapatan 1967. Tertakluk kepada peraturan-peraturan tertentu, keseluruhan perkara tersebut dan perbicaraan mungkin diselesaikan oleh Mahkamah Persekutuan sebagai mahkamah apeks (lihat perenggan 29).

(4) Pemfailan serentak permohonan ini dan rayuan pemohon kepada Pesuruhjaya Khas sememangnya membentuk kependuaan perbicaraan dan ia remeh dan menyusahkan dan adalah penyalahgunaan proses mahkamah (lihat perenggan 30).]

Notes

For cases on application for judicial review, see 1 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 162–164.

For application for judicial review, 9 *Halsbury's Laws of Malaysia*, para [160.061].

Cases referred to

Association of Bank Officers, Peninsular Malaysia v Malayan Commercial Banks Association [1990] 3 MLJ 228 (refd)

Badat bin Drani v Tan Kheat [1953] MLJ 67 (refd)

Bandar Utama Development Sdn Bhd & Anor v Lembaga Lebuhraya Malaysia & Anor [1998] 1 MLJ 224 (refd)

Government of Malaysia & Anor v Jagdis Singh [1987] 2 MLJ 185 (refd)

Hongkong & Shanghai Banking Corporation, Ipoh v Rent Tribunal For Ulu Kinta & Ors [1972] 1 MLJ 70 (refd)

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Lim Kui Siam & Anor, (Representing all the members of Persatuan Penduduk-Penduduk Kawasan Hj Manan, Kluang) v Pentadbir Tanah, Daerah Kluang [1995] 1 CLJ 846 (refd)
Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan [1999] 3 MLJ 1 (refd)
Melayu Raya Press Limited v WL Blythe The Colonial Secretary [1951] MLJ 89 (refd)
National Land Finance Co-operative Society Ltd v Ketua Pengarah Hasil Dalam Negeri [1998] 4 CLJ Supp 232 (refd)
R v Chief Immigration Officer Gatwick Airport; ex p Kharrazi [1980] 3 All ER 373 (refd)
R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145 (dist)
Sykt Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan Bhd v Majlis Perbandaran Pulau Pinang [1999] 3 MLJ 1 (refd)
T Mohan a/l Ellen & Ors v Pentadbir Tanah Daerah Petaling [2000] 2 MLJ 431 (refd)
Tuan Hj Sarip Hamid & Anor v Patco Malaysia Bhd [1995] 2 MLJ 442 (refd)

Legislation referred to

Income Tax Act 1967 ss 99-102, para 34, Schedule 5
Rules of the High Court 1980 O 53 r 3,
Town and Country Planning Act 1976 s 23

Suzana bte Atan (Attorney-General's Chambers) for the respondents
Ahmad Musthafi bin Mohamad (Koh Kim Leng & Co) for the applicant

Low Hop Bing J:

APPLICATION

[1] This is an application by the applicant for leave to commence proceedings under O 53 r 3 of the Rules of the High Court 1980 for an order of certiorari to quash and set aside the notice of assessment in Form J dated 1 August 2003 issued by the first respondent ie the Director General of Inland Revenue to the applicant for the income tax year of assessment 1998 ('the impugned notice of assessment').

[2] This application is premised on the ground that the impugned notice of assessment is invalid in that it contains an error of law on the face of it.

[3] I have directed that this ex parte application be heard inter partes.

BACKGROUND

[4] This has been stated in the applicant's affidavit in support filed herein and must be treated as mere allegations of fact and does not in any way constitute a specific finding of fact by me.

[5] By a sale and purchase agreement dated 27 September 1991, the plaintiff bought three pieces of land viz Lots 271, 275 and 315 in the mukim

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of Cheng in the state of Melaka ('the Cheng land') at the price of RM2,771,423.33 for the purpose of setting up an integrated steel mill, against which the local residents there had protested. Consequent thereto, the applicant built the steel mill on another piece of land in Ayer Keroh, Melaka ('the Ayer Keroh land').

[6] On 5 March 1997, vide three agreements, the applicant disposed of the Cheng land at RM9,489,577.86 ('the disposal').

[7] The applicant had submitted to the Inland Revenue Board the relevant notification in Form CKHT1 in respect of real property gains tax for the disposal.

[8] Subsequently, the first respondent issued the impugned notice of assessment for the purpose of subjecting to income tax the gains accrued from the sale thereof.

[9] On 17 January 2002, the applicant wrote to the first respondent stating that the gains on the disposal of the Cheng land should not attract income tax liability.

[10] On 20 August 2003, the applicant wrote another letter to the first respondent requesting the first respondent to review the decision.

[11] On 29 August 2003, the applicant filed both a notice of appeal in Form Q ('the Form Q notice of appeal') and this application simultaneously.

RESPONDENT'S OBJECTION

[12] In objecting to the application herein, Cik Suzana bte Atan, learned senior federal counsel, submitted that the application is frivolous and vexatious and an abuse of the process of the court on the ground that there is an alternative remedy of appeal under s 99 of the Income Tax Act 1967 ('s 99'), which the applicant has already invoked by filing the Form Q notice of appeal.

[13] It was further stressed that there are no exceptional circumstances to grant leave for judicial review here; and that it would render futile the policy under the Income Tax Act 1967 which provides for an appeal to the Special Commissioners.

[14] Another view taken for the respondent is that there is a duplicity of proceedings in view of this application and the appeal to the Special Commissioners.

APPLICANT'S RESPONSE

[15] Encik Ahmad Mustafi bin Mohamad, learned counsel for the applicant, echoed the aforesaid ground in urging this court to grant leave for certiorari notwithstanding the filing of the Form Q notice of appeal. Support was sought in *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145; and *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan* [1999] 3 MLJ 1 FC.

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[16] He added that the mere availability of an appeal procedure will not automatically shut out an application for certiorari, as, according to him, the application herein is not frivolous or vexatious nor an abuse of the process of the court, as the alternative remedy of appeal to the Special Commissioners does not constitute a wholly adequate machinery for the just disposal of the complaint herein.

DECISION OF THE COURT

Question for determination

[17] Having carefully considered the aforesaid submissions, it is clear to me that the question for determination may be stated as follows: Is the appellant who has exercised the alternative right of appeal by filing a Form Q notice of appeal under s 99 of the Income Tax Act 1967 precluded from applying for leave to obtain the relief of judicial review by way of certiorari under O 53 of the Rules of the High Court 1980?

Principles governing application for leave under O 53

[18] It is useful to revisit the principles which our courts have established in dealing with an application for leave to obtain the relief of judicial review by way of certiorari under O 53 as follows :

(1) The judge should grant leave if it is clear that there is a point for further investigation on a full inter partes basis with all such evidence as is necessary on the facts and all such arguments as is necessary on the law.

(2) If the judge is satisfied that there is no arguable case he should dismiss the application for leave to move for judicial review.

(3) If on considering the papers, the judge comes to the conclusion that he really does not know whether there is or is not an arguable case, the right course is for the judge to invite the putative respondent to attend and make representations as to whether or not leave should be granted: see eg *Bandar Utama Development Sdn Bhd & Anor v Lembaga Lebuhraya Malaysia & Anor* [1998] 1 MLJ 224 HC, per Visu Sinnadurai J (as he then was); and *Tuan Hj Sarip Hamid* & *Anor v Patco Malaysia Bhd* [1995] 2 MLJ 442 SC, per Edgar Joseph Jr SCJ (as he then was).

(4) The applicant must show prima facie that the application is not frivolous or vexatious and that there is some substance in the grounds supporting the application: per Ajaib Singh SCJ (as he then was) in *Association of Bank Officers, Peninsular Malaysia v Malayan Commercial Banks Association* [1990] 3 MLJ 228 SC.

(5) An application will fail where there is an alternative remedy: *Hongkong & Shanghai Banking Corporation, Ipoh v Rent Tribunal For Ulu Kinta & Ors* [1972] 1 MLJ 70 FC, per Chang Min Tat J (later FJ); on appeal to the Federal Court per Ong Hock Thye CJ (Malaya), Ali and Ong Hock Sim FJJ (as they then were); *Badat bin Drani v Tan Kheat* [1953] MLJ 67;

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Melayu Raya Press Limited v WL Blythe The Colonial Secretary [1951] MLJ 89; *Government of Malaysia & Anor v Jagdis Singh* [1987] 2 MLJ 185 SC. *Lim Kui Siam & Anor, (Representing all the members of Persatuan Penduduk-Penduduk Kawasan Hj Manan, Kluang) v Pentadbir Tanah, Daerah Kluang* [1995] 1 CLJ 846; and *T Mohan a/l Ellen & Ors v Pentadbir Tanah Daerah Petaling* [2000] 2 MLJ 431 per Abu Samah J.

(6) Where there is an alternative remedy of appeal, leave to issue certiorari will only be granted in exceptional circumstances such as:

(a) a clear lack of jurisdiction;

(b) a blatant failure to perform some statutory duty;

(c) a serious breach of the principles of natural justice: see eg *National Land Finance Co-operative Society Ltd v Ketua Pengarah Hasil Dalam Negeri* [1998] 4 CLJ Supp 232 HC; per Nik Hashim J (now JCA);

(d) illegality: *Majlis Perbandaran*.

(7) The categories of exceptional circumstances are not closed, and the burden is on the applicant to prove the existence of any of the exceptional circumstances: *Lim Kui Siam*.

Authorities cited for applicant

[19] I shall now consider the two judgments of the Federal Court which the applicant has relied upon.

[20] In *R Rama Chandran,* the employee who has been dismissed by the employer made a representation to the Director General for Industrial Relations, claiming that he was dismissed without just cause or excuse. His representation was referred to the Industrial Court which dismissed his claim. The employee applied to the High Court for the relief of judicial review by way of certiorari but his application was also dismissed. The employee appealed to the Federal Court. The question of law for determination by the Federal Court was, inter alia, whether the award of the Industrial Court should be quashed, and it has absolutely nothing to do with an application for leave to obtain the relief of judicial review by way of certiorari before me. Hence, I am of the view that the majority judgments of Eusoff Chin Chief Justice and Edgar Joseph Jr FCJ are of no assistance to the applicant herein.

[21] In *Majlis Perbandaran Pulau Pinang,* the facts were somewhat complicated but what is relevant to the instant application is that the respondent ('society') had disputed the additional conditions imposed by the Municipal Council ('the Council') in granting planning permission to the society. The society had appealed to the Council against the additional conditions ('the disputed conditions'). The Council rejected the appeal on 20 September 1993 and communicated the rejection to the society on 23 September 1993. On 11 October 1993, the society commenced proceedings against the Council by way of an ex parte application for leave to apply for an order of certiorari to quash the disputed conditions, on grounds of breach of natural justice, ultra vires, *Wednesbury* unreasonableness, irrationality and mala fides.

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[22] One of the grounds raised for the Council was that the society's application was barred by the existence and the non-exercise of the alternative appeal procedure provided for by s 23 of the Town and Country Planning Act 1976 ('the Act'). The High Court at Penang heard the application inter partes and upheld the Council's contention.

[23] The society appealed to the then Supreme Court which reversed the decision of the High Court and granted leave to appeal for certiorari. The substantive motion for certiorari was directed to be heard before another judge who in August 1994 dismissed the application based on the alternative appeal procedure point. The society appealed to the Court of Appeal which allowed the appeal: *Sykt Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan Bhd v Majlis Perbandaran Pulau Pinang* [1996] 2 MLJ 697. The Council appealed to the Federal Court.

[24] It is to be observed that the society did not exercise the right of appeal under s 23 of the Act. In partly allowing the appeal, the Federal Court, through the judgment of Edgar Joseph Jr FCJ, at p 40, recognized that there are certain classes of cases such as planning and tax cases where a statute provides for a specialised appeal procedure, and so the courts understandably may not grant judicial review but this is always subject to the grant of review in certain cases, for example, where an applicant is able to demonstrate an excess or abuse of power, or breach of the rules of natural justice. His Lordship at p 38, after referring to the judgment of Lord Denning MR in *R v Chief Immigration Officer Gatwick Airport; ex p Kharrazi* [1980] 3 All ER 373, to the effect that the availability of appeal does not debar the court from quashing an order by certiorari, emphasised at p 371 that regard must be had to the complexity of every case and that 'everything depends upon the facts of the case'. (See also p 380 of Lord Denning MR's judgment.)

[25] While I appreciate that the applicant's learned counsel has expended enormous efforts in referring to and analysing *Majlis Perbandaran*, I am of the view that in the ultimate analysis, the grant or refusal of leave in an application such as the instant application must necessarily depend on the facts of this case.

Merits of application

[26] The merits of the instant application may be determined by reference to the ground relied upon ie that the impugned notice of assessment is invalid in that it contains an error of law on the face of it.

[27] The validity of otherwise of the impugned notice of assessment or the existence or otherwise of an error of law may be raised as an issue in the hearing of the applicant's appeal before the Special Commissioners under s 99. Extensive provisions have been enacted from ss 99 to 102 and Schedule 5 to the Act which establish adequate machinery for the disposal of the applicant's complaint by way of due process of law.

[28] The hearing of the applicant's appeal before the Special Commissioner is indeed an additional platform or forum for the applicant to ventilate its

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views, in line with the fundamental rules of natural justice whereby the applicant is given every opportunity to present its case in the tribunal of the first instance.

[29] Ultimately, the aggrieved party is given the statutory right of appeal by way of case stated, which will be heard in the High Court pursuant to para 34, Schedule 5 to the Income Tax Act 1967. Subject to the rules governing such appeals, the entire matter and proceedings may finally and conclusively be determined by the Federal Court as the apex court.

[30] Further, I am also of the view that the concurrent filing of the instant application and applicant's appeal before the Special Commissioners certainly constitutes a duplicity of proceedings and is indeed frivolous, vexatious and an abuse of the process of the court.

[31] In *Jagdis Singh,* the facts are substantially similar to those in the instant application. There the respondent had received notices of additional assessment for income tax. The respondent's accountant wrote to the Inland Revenue Department, Ipoh informing them of the respondent's desire to appeal against the additional assessments. However, the respondent filed a notice of motion for an order of certiorari to quash the said notices of additional assessment on the ground 'that notices of assessment are based on conjecture and have been issued maliciously and as a 'vindictive act'. The learned judge of the High Court granted the respondent's application. On appeal, the Supreme Court through the judgment of Hashim Yeop A Sani SCJ (later CJ (Malaya)) held that the discretion is still with the courts to act by way of judicial review, but where there is an appeal procedure available to the applicant, certiorari should not normally issue save in exceptional circumstances.

Conclusion

[32] On the following grounds, in particular the judgment of the Supreme Court in *Jagdis Singh,* I hold that the instant application is wholly without merits. The answer to the above question for determination is in the affirmative. I therefore dismiss this application with costs.

Application dismissed with costs.

Reported by Ashgar Ali Ali Mohamed